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Silence as an Admission in Kentucky Criminal Cases

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SILENCE AS AN ADMISSION IN KENTUCKY CRIMINAL CASES

The purpose of this note is to discuss and clarify the law in Kentucky on silence as an admission against interest in criminal cases. The cases on this subject are in a state of confusion. In order to understand the Kentucky situation, the problem will be examined generally before analyzing the cases and suggesting changes.

I. *Silence-Historical Development*

In the early English and American cases the courts generally held that silence in the face of an accusation was admissible even though the accusatory statement would otherwise have been excluded as hearsay.[1] One of the theories behind this rule of evidence was that the average innocent person would deny any false accusation made by another;[2] it would be contrary to man's nature to fail to make such a denial.[3] Another theory for the rule was based on the ancient maxim, *qui tacet consentire videtur*, which means, "silence gives consent."[4] The courts limited the application of this broad maxim by holding that *"whatever was said in a party's presence* was receivable against him as an admission" because he presumably assented to it.[5] This rule resulted in a high degree of risk in that the accused was unduly prejudiced by the admission of his failure to deny. In order to protect the accused it became imperative to modify the rule.

An early indication of the trend toward qualification of the rule was found in two civil cases: (1) the evidence should always be received with caution; the accusation should be of the kind which naturally calls for contradiction;[6] (2) silence as an admission should create no more than in inference.[7] While these qualifications did not develop directly within the criminal law, they undoubtedly had an influence on criminal cases.

In 1847, the Massachusetts court rendered the landmark decision, *Commonwealth v. Kenney*,[8] which placed limitations on the rule regarding tacit admissions by an accused. The court held that the accusations by a watchman to the effect that the defendant had stolen money, to which the defendant made no reply, were not competent evidence of admission of the theft. The court stated that there are

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[1] 4 Wigmore, Evidence §1071 (3rd ed. 1940); 47 Mich. L. Rev. 715, 716 (1949); 15 U. Miami L. Rev. 161, n. 7 (1960).
[2] 47 Mich. L. Rev. 715, 716 (1949).
[3] 5 St. Louis U. L.J. 469, 490 (1958).
[4] 4 Wigmore, *op. cit. supra* note 1, §1071.
[5] *Ibid.*
[6] 14 S. & R. 388, 393 (Pa. 1826).
[7] Vail v. Strong, 10 Vt. (1 Sh.) 457, 463 (1838).
[8] 53 Mass. (12 Met.) 235 (1847).

some cases where silence might be an admission, but it would depend on two facts: (1) whether he hears and understands the statement, and comprehends its meaning; and

> (2) whether the truth of the facts embraced in the statement is within his knowledge, or not; whether he is in such a situation that he is at liberty to make any reply; and whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it.[9]

The modern rule incorporates these limitations upon the original rule. Today the silence of an accused may be admissible into evidence as an implied, tacit, or adoptive admission,[10] or as an admission which manifests a *probable* state of belief[11] or a consciousness of guilt.[12] However, certain general conditions must be met: (1) the accusation must have been made in the presence and hearing of the accused; (2) the accusation must have been understood and related to facts within his knowledge; (3) the accused must have had a reasonable opportunity to deny the statement; and (4) the accusation must have been one which naturally would call for a denial from reasonable men similarly situated.[13]

II. *Silence—Before and After Arrest*

There is general agreement that silence to accusations made *before* the defendant's arrest will be admitted if the above conditions are met.[14] However, there is a conflict of authority whether silence is admissible in the face of an accusation made *after* arrest.

The majority[15] of the jurisdictions has established the hard-and-fast rule that the silence of a person when faced with an accusatory statement after arrest is not admissible.[16] These courts refuse to allow the prosecution to confront the defendant with his silence because of the widely held fear that anything one says would be used against him. Moreover, the individual unfamiliar with the law would want to avoid a verbal battle with the police and by-standers before consulting an attorney.[17]

Another reason for ruling that silence is not admissible after an arrest is that it might be regarded as an implied claim of the privi-

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[9] *Id.* at 237.
[10] 6 U.C.L.A.L. Rev. 593 (1958).
[11] McCormick, Evidence §247 (1954).
[12] 4 Wigmore, Evidence §1072 (3rd. ed. 1940).
[13] *E.g.*, Commonwealth v. Kenney, 53 Mass. (12 Met.) 235, 237 (1847). See also 15 U. Miami L. Rev. 161, 163-64 (1960); 6 U.C.L.A.L. Rev. 593, 594 (1958).
[14] 5 St. Louis U. L.J. 469, 488-90 (1958).
[15] 4 Wigmore *op. cit. supra* note 12. See also cases, pro and con, listed in Annots., 80 A.L.R. 1235 (1932), 115 A.L.R. 1510 (1938); Dec. Dig. Crim. Law Key 407(2).
[16] McCormick, Evidence §247 (1954).
[17] 5 St. Louis U. L.J. 469, 491 (1958).

lege against self-incrimination.[18] If silence were a claim of the privilege then the question would arise as to how the privilege should be asserted.[19] To require that the accused expressly assert the privilege would result in an unjust application since habitual criminals would exercise the privilege while the inexperienced or innocent suspects would be unaware of this right.[20] The fear of effecting this result through the use of the privilege of self-incrimination may have been one reason for not allowing the admissibility of silence.

The rule in the federal courts is that no inference of assent can be drawn from the silence of the accused person if he was under arrest at the time that the accusation was made.[21] In 1928, a circuit court[22] stated that if silence after arrest were admissible, the customary warning should read: "If you say anything, it will be used against you; if you do not say anything, that will also be used against you."[23] Although this observation has a sarcastic tone, it appears that this is precisely the situation in which the suspect finds himself in jurisdictions following the minority rule as to the admissibility of silence *after* arrest.

According to the minority rule the mere fact of arrest, by itself, would not keep evidence of silence from the jury.[24] Arrest is simply one factor to be considered in determining the attendent circumstances.

This position was recognized in a recent New Jersey case,[25] in which the defendant was prosecuted for illegal gambling. The court admitted testimony respecting the defendant's tacit admission of the crime when confronted with incriminatory statements by co-conspirators at the police station. This view is more flexible,[26] since arrest does not have as great an influence on the attendent circumstances.

III. *Silence—Burden of Proof*

The court determines whether evidence of silence is admissible.[27] This raises a question as to the burden of proof. Wigmore says that the burden of proof should be on the opponent of the evidence. How-

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[18] 6 U.C.L.A.L. Rev. 593 (1958).
[19] *Id.* at 596.
[20] 30 So. Cal. L. Rev. 1 (1956).
[21] See United States v. L. Biondo, 135 F.2d 130 (2nd Cir. 1943); Yep v. United States, 83 F.2d 41 (10th Cir. 1936); McCarthy v. United States, 25 F.2d 298 (6th Cir. 1928).
[22] McCarthy v. United States, 25 F.2d 298 (6th Cir. 1928).
[23] *Id.* at 299.
[24] *E.g.*, State v. Kobylarz, 44 N.J. Super. 250, 130 A.2d 80 (1957). See 5 St. Louis U. L.J. 469, 491 (1958).
[25] State v. Kobylarz, 44 N.J. Super. 250, 130 A.2d 80, 86-87 (1957).
[26] 4 Wigmore *op. cit. supra* note 12, §1072.
[27] 6 U.C.L.A.L. Rev. 593, 595 (1958).

ever, he concedes that in practice the burden generally falls on the prosecution to show that the requisite conditions exist.[28]

Even if the prosecution sustains the burden and the evidence of silence goes before the jury, there will be ample opportunity for the defense to "explain it away" in rebuttal by circumstances showing that his silence was due to other reasons.[29]

IV. *Silence—Admissibility in Kentucky*

The decisions of the Court of Appeals of Kentucky on the admissibility of silence are in such confusion that the practicing attorney will find it difficult to ascertain whether this evidence will be admitted under *any* circumstances. In *Jackson v. Commonwealth*,[30] the first Kentucky case dealing with silence, the defendant quickly denied the accusations made by his co-conspirator. However, the court, by dictum, stated that the evidence would have been incompetent, even if the defendant had remained silent, because he had not been called on to answer or deny. "He had the right to remain silent when charged with the crime, and guilt is not to be imputed to him by reason of that silence."[31] The strictness of this dictum was substantiated in *Porter v. Commonwealth*,[32] where the Court of Appeals used the *Jackson* case as authority for excluding the proof of the silence of the defendant who had failed to deny the confession of his alleged accomplice which implicated them both. The decision was reversed because this implied admission by the defendant had been the principal evidence against him on trial. However, the court broadened the question of admissibility of silence by quoting Section 968 of Robertson's Kentucky Criminal Procedure.[33] The substance of that section on the admissibility of evidence of silence is that the accused must have heard, understood and been at liberty to make a reply under such circumstances as naturally call for a reply.

The *Jackson* and the *Porter* cases, together with case authority from Massachusetts[34] and Alabama[35] were used in the landmark decision of *Merriweather v. Commonwealth*.[36] In this case the defendant, a Negro, and others had been indicted for killing a white man. These suspects had been chained to one another in the waiting room of a depot. Subsequently a crowd gathered and some of the spectators

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[28] 4 Wigmore *op. cit. supra* note 12, §1071.
[29] *Id.* at §1072.
[30] 100 Ky. 239, 38 S.W. 422 (1896).
[31] *Id.* at 261, 38 S.W. at 427.
[32] 22 Ky. L. Rep. 1657, 61 S.W. 16 (1901).
[33] *Id.* at 1657-59, 61 S.W. at 17.
[34] Commonwealth v. Kenney, 53 Mass. (12 Met.) 235 (1847).
[35] Bob v. State, 32 Ala. 560 (1858).
[36] 118 Ky. 870, 82 S.W. 592 (1904).

or law officers accused the defendant of murder. The defendant made no reply to the accusations. On trial, the court overruled the defendant's objections and admitted the accusations and the defendant's silence. However, on appeal the admission of this evidence was ruled prejudicial and reversible error. The court reasoned that the silence of the defendant was natural since he feared for his life, lacked an opportunity to consult counsel and was "ignorant of a proper course to pursue."[37] Furthermore, the court stated that if evidence of silence under these circumstances was admissible then each accused would have to "parry every cross-examination attempted by every self-appointed questioner."[38] The court in the *Merriweather* case enunciated the general rule that if the silence of an accused was the admission of the truth of an accusatory statement, he made it his statement by "adoption."[39] After setting forth this rule, the court outlined a broad test which was to be used in deciding whether future situations called for the admission of silence by "adoption." In the first part of the test the court gave the impression of limiting itself to a single inquiry for the admission of such evidence:

> The sole inquiry is, did the person attempted to be bound actually admit it, voluntarily and understandingly? Is it evinced that by an action of his mind he, in effect, likewise declared the fact to be as stated?[40]

However, the case established further requisites as the second half of the test.
These were:

> (1) Did the person to be bound by the statement hear it? (2) Did he understand it? (3) Did he have an opportunity to express himself concerning it? (4) Was he called upon to act upon or reply to it?[41] [(5) C]ircumstances must be such as 'naturally and properly call for some action or reply from men similarly situated.'[42]

The first part of the *Merriweather* test is very strict in that it requires that the silence constitute an admission as strong as the words of an actual confession. If a judge used this part of the test exclusively, he could hardly declare that any silence equaled an oral admission. Therefore, the use of this part of the test would leave little possibility for the admission of silence. The real substance lies in the second half of the test, which calls for the fulfillment of exact prerequisites while still allowing flexibility in the judge's determination. If these conditions are met, and if the situation is one which naturally

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[37] *Id.* at 878, 82 S.W. at 595.
[38] *Ibid.*
[39] 118 Ky. 870, 877, 82 S.W. 592, 594.
[40] *Ibid.*
[41] *Ibid.*
[42] 118 Ky. 870, 878, 82 S.W. 592, 595.

calls for a denial, then there is a strong possibility that the silence would be admissible. In many of the later cases involving silence of an accused, the Court of Appeals has only used either the first or the second half of the *Merriweather* test; this has led to confusion as to whether evidence of silence could be admitted under *any* circumstances.

In a 1909 case,[43] the defendant was accused by his sister of a crime in the presence of a crowd of angry men. He did not reply to this accusation. The evidence of his silence was held inadmissible in view of his fright and danger. The court used the second half of the *Merriweather* test to reach its decision.[44] The court added that evidence of such a statement when not denied would sometimes be admissible, but never unless the accused had heard and understood the statement and had the liberty to reply.

In 1910,[45] a confused court held that evidence of silence was inadmissible. The court used the *Merriweather* case as authority for this decision. However, this case was overruled by a later decision[46] which stated that the *Merriweather* rule had been completely misinterpreted and extended beyond its original application. In 1915,[47] the Court of Appeals held that the testimony of a witness who overheard a conversation between the two negro defendants while they were in jail should be admitted. The statement made to one of the defendants was, "You know you are the one that fired the shot."[48] The court held that the statement and subsequent silence were admissible under a different application of the *Merriweather* rule. However, this was an inaccurate observation because the second half of the *Merriweather* test rather than a different application was used, *i.e.*, since the court reasoned that the statement was made under such circumstances that the defendant, who was accused, naturally would have denied the charge, if false. The court reasoned further that in their ignorance, it was perfectly natural for the Negroes to believe that the one who actually fired the shot was the more guilty.[49]

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[43] Sprouse v. Commonwealth, 132 Ky. 269, 116 S.W. 344 (1909).

[44] See also Smith v. Commonwealth, 140 Ky. 599, 131 S.W. 499 (1910), where the evidence of silence was admitted on the grounds that it is within the res gestae as well as being within the *Merriweather* rule.

[45] Hayden v. Commonwealth, 140 Ky. 634, 131 S.W. 521 (1910).

[46] Bowlin v. Commonwealth, 195 Ky. 600, 242 S.W. 604 (1922). See also Ellis v. Commonwealth, 146 Ky. 615, 143 S.W. 425 (1912), where the court held that the defendant could not be prejudiced by a third party's statements because the court had ruled that they had been adopted and had been made a part of the defendant's testimony.

[47] Wilson v. Commonwealth, 166 Ky. 301, 179 S.W. 237 (1915).

[48] *Id.* at 309, 179 S.W. at 240.

[49] *Id.* at 309-10, 179 S.W. at 240-41. See Bowlin v. Commonwealth, 195 Ky. 600, 242 S.W. 604 (1922), where the Court of Appeals again used the sec-

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In 1929,[50] the Court of Appeals held that the element of arrest would not operate *per se* to keep the evidence of silence from the jury. In the lower court, an officer had testified that, while under arrest, the defendant was confronted with an accusation that he had killed three men. On trial the defendant admitted that something had been said to him, but denied that he had made any reply. The Court of Appeals upheld[51] admittance of the evidence of silence. The court used the second-half of the *Merriweather* test to show that the accusation had not only been heard and understood, under circumstances that allowed for ample opportunity to deny, but that it also had been an accusation which called for a denial, if false. This apparently settled the question of whether, under the *Merriweather* rule, the factor of arrest by itself would keep the evidence of silence from the jury.[52]

In *Griffith v. Commonwealth*,[53] it was held that the defendant didn't have to make repeated denials of accusations. The court reasoned that because he had made denials, the *Merriweather* rule was inapplicable.

In a subsequent case[54] the court declared that a witness's statement could not be considered as such an accusation as would imply admission from the defendant's silence. The reasoning was misleading because the court quoted only the dictum from the *Griffith* decision which purported to limit the admission of the evidence of silence "by declarations of one made without the sanction of an oath or of the presence of death or as a spontaneous utterance connected with the occurance."[55] These strict limitations were not employed by the Court in a subsequent case,[56] which by dictum mentioned the second

(Footnote continued from preceding page)
ond half of the *Merriweather* rule in admitting evidence of a defendant's silence. See Hord v. Commonwealth, 227 Ky. 439, 13 S.W.2d 244 (1928), where the court reached an excellent result since the defendant, who was taken to the hospital to see the man he allegedly shot, tried to conceal himself so that the wounded man could not make an identification. When the wounded man accused the defendant of the shooting, he remained silence. This evidence of silence was admitted.

[50] Pierson v. Commonwealth, 229 Ky. 584, 17 S.W.2d 697 (1929).

[51] Apparently *Peirson* would have overruled the *Jackson* and *Porter* cases if they had been expressly decided on the basis that the defendant had been under arrest at the time of his silence.
See Finch v. Commonwealth, 29 Ky. L. Rep. 187, 92 S.W. 940 (1906), where silence was admitted after an accusation even though the defendant had been under arrest at the time. The second-half of the *Merriweather* test was used as a basis for its decision.

[52] See Annot. 80 A.L.R. 1235, 1260 (1932) for an excellent discussion of Kentucky cases regarding silence after arrest.

[53] 250 Ky. 506, 63 S.W.2d 594 (1933).

[54] 280 Ky. 830, 134 S.W.2d 945 (1939).

[55] 250 Ky. 506, 510, 635 S.W.2d 594, 596.

[56] Lett v. Commonwealth, 284 Ky. 267, 144 S.W.2d 505 (1940).

part of the *Merriweather* test as the test for the "adoption" rule.

The law on silence as an admission was further confused by *White v. Commonwealth*,[57] where the defendant, after his arrest, refused to admit or deny a charge of rape; "I won't say that I did have intercourse with either of these girls, Dorothy or Irene, and I won't say that I did not at this time."[58] The Commonwealth argued that this was not silence in the face of an accusation. The court, however, held that this was equivalent to silence, and thereby inadmissible under the *Merriweather* rule.

The present state of the law regarding silence is reflected by a statement of dictum in a 1960 case:[59] "there is an exception to the rule against post-factum statements and conduct of co-conspirators where they occur in the presence of the accused under such circumstances that his failure to deny reasonably implies an admission."[60]

V. *Silence—Suggested Revisions*

Before suggesting a test for the admissibility of evidence of silence, it is necessary to look at the practical problem involved—how much protection is to be granted defendants in criminal cases? Certainly, defendants must have protection, but if the courts offer too much protection many guilty defendants might escape punishment, and the judicial system would not fulfill its duty to society. To avoid this dilemma the evidence of silence shoud be admissible if certain conditions are met: (1) the accusation must have been made within the presence and hearing of the accused, (2) the accusation must have been understood, (3) the accused must have had the opportunity to deny the accusation and (4) the accusation must have occurred under circumstances that would have called for a denial from men similarly situated. This is in essence the second-half of the test adopted by the *Merriweather* case.

It is further suggested that the court instruct the jury that the accusation should be given weight only as it relates to defendant's silence.[61]

Such evidence can be viewed in at least three ways: as an adoption,[62] as a belief in its truth,[63] or as a *probable* state of belief.[64] The adoptive theory is objectionable as prejudicial because: (1) the de-

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[57] 292 Ky. 416, 166 S.W.2d 873 (1942).
[58] *Id.* at 421, 166 S.W.2d at 876.
[59] Senibaldi v. Commonwealth, 338 S.W.2d 915 (Ky. 1960).
[60] *Id.* at 918.
[61] 15 U. Miami L. Rev. 161, 162 (1960).
[62] Commonwealth v. Kenney, 53 Mass. (12 Met.), 235 (1847).
[63] Model Code of Evidence rule 507(b) (1942); Uniform Rule of Evidence rule 63(8) (1953).
[64] McCormick, Evidence §247 n. 9 (1954).

fendant is bound by a hearsay declaration without any opportunity to change its terms; (2) such adoption could be regarded as a confession and unduly emphasized by the jury. The second view is objectionable for these same reasons. Silence viewed as a manifestation of a *probable* state of belief is acceptable because the jury would be required to ascertain the defendant's state of mind and his consciousness of the truth of the statement at the time of his failure to deny.

The final suggestion is that Kentucky continue to hold that arrest should not operate *per se* to keep the evidence of silence from the jury. Even though there may be a tendency by the accused to remain silent due to the fear that anything said after arrest will be used against him, his silence can be explained as a result of this fear. The admission of evidence of silence even after the arrest of the accused is the better rule because it gives defendants protection against undue prejudice due to the admission of the evidence of silence yet still furnishes reasonable opportunity for conviction of the guilty.

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